

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JULIAN J. GUTIERREZ**  
Claimant

VS.

**DIEBOLT LUMBER & SUPPLY, INC.**  
Respondent

AND

**SEDGWICK CLAIMS MGMT. SERVICES**  
Insurance Carrier

Docket No. 1,032,056

**ORDER**

Respondent requests review of the June 29, 2007 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

**ISSUES**

The Administrative Law Judge (ALJ) awarded claimant continued medical treatment with Dr. Buhr and deferred any decision relating to temporary total disability benefits.

The respondent requests review of this decision alleging the ALJ had no authority to issue any preliminary hearing Order under these facts.

Claimant argues that it provided the requisite notice and that the Order is valid and should be affirmed. Moreover, claimant maintains there is no jurisdiction for the Board to consider this matter.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this member of the Board makes the following findings of fact and conclusions of law:

The instant matter presents an unusual and curious factual scenario. This claim was filed with the Division on November 27, 2006. On November 21, 2006, a Notice of

Intent was sent directly to respondent and received on November 22, 2006. This document demanded medical treatment and temporary total disability benefits (ttb) for claimant's alleged work-related injury. No specific demand for treatment with any particular provider was requested and no medical records were attached to this demand, nor with any of the filings presented to the Court.

Treatment was apparently not forthcoming and an Application for Preliminary Hearing was filed and a hearing was set for February 7, 2007. The letter setting the hearing was mailed to Judge Klein on December 15, 2006 with a copy again directly to respondent.

Respondent's counsel apparently entered his appearance in this case on December 19, 2006. Respondent's counsel denies receiving any notice of hearing regarding the February 7, 2007 hearing. And after reviewing the file, it appears that while a hearing was held on that date, no record was made. There is no indication within the file what transpired on that date, who was present or what was said. Nor was there any Order issued within 5 days as required by statute.<sup>1</sup>

Both before and after February 7, 2007, the parties were engaging in the discovery process as there was and is some issue as to the underlying compensability of this claim in light of the drug and alcohol defense encompassed by K.S.A. 44-501(d)(2). As of December 19, 2006, claimant's counsel clearly knew respondent was represented by counsel, but claimant's counsel made no mention of the first preliminary hearing during any of these conversations. And even more troubling is the fact that claimant's counsel apparently proceeded with the February 7, 2007 hearing knowing full well that respondent was represented, but made no effort to contact respondent's counsel about the hearing.

Things become more confused over time as another Application for Preliminary Hearing was filed on June 4, 2007. This application was based upon claimant's request to continue treatment with Dr. Buhr, treatment that had apparently been cut off by respondent. Notice of that application was sent to both attorneys for the parties. But the file reveals that no preliminary hearing was ever set in response to this request.

The only order that is contained within the file is an Order, dated June 29, 2007, showing that both parties' counsel were present on some unknown date and that medical treatment is to proceed with Dr. Buhr. Copies of this Order were sent to both attorneys. It is this Order that respondent has appealed.

Respondent primarily focuses on its lack of notice of the February 7, 2007 hearing and claimant's failure to follow "proper procedures" in this case. Claimant responds by saying that the Board has no jurisdiction to hear this matter under K.S.A. 44-534a.

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<sup>1</sup> K.S.A. 44-534a(a)(2).

Claimant is partially correct. K.S.A. 44-534a limits the Board's jurisdiction to consider appeals from preliminary hearing orders to certain issues involving the underlying compensability of the claimant's injury. Those issues include (1) Whether the employee suffered an accidental injury; (2) Whether the injury arose out of and in the course of the employee's employment; (3) Whether notice is given or claim timely made; and (4) Whether certain defenses apply. But, the Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>2</sup>

And respondent's concerns are, at least based upon this record, well founded. While respondent (and not its counsel) may have received notice of the February 7, 2007 preliminary hearing, there is no record indicating what transpired at that hearing. Alternatively, if the Order now being appealed is as a result of the June 4, 2007 Application for Preliminary Hearing, that is even more disturbing as there is no notice of hearing within the file, nor does it appear that any transcript was made of that proceeding, if there was one. The Act generally requires a transcript to be issued following hearings.<sup>3</sup> The simple fact is the Order does not indicate what prompted it to be issued. It is clear that it was not issued within 5 days of the February 7, 2007 hearing as required by law and that is all that can be gleaned from the Order itself. And without additional information, it is impossible to determine if the Board now has jurisdiction.

There are still other problems with the Order. The Order indicates respondent's counsel was present at that proceeding (whenever it was). Yet respondent's attorney has stated that he knew of any hearing on February 7, 2007 and therefore could not have been present. And there have apparently been no other hearings in this matter. Thus, it is extremely troubling that the Order reflects something that is apparently a factual error, many months after the hearing.

This member of the Board is also concerned about the fact that an Order was entered without any indication that evidence was offered. The file contains no medical records, not even with the preliminary hearing request as required by statute.<sup>4</sup> And there is no transcript indicating evidence was provided during this February 7, 2007 hearing.<sup>5</sup> Even more problematic is the fact that if a hearing was indeed held on February 7, 2007, the hearing was held at a time when claimant's counsel knew respondent was represented. While the notice that went directly to respondent before respondent's counsel entered his appearance probably satisfied due process requirements, when it became clear

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<sup>2</sup> See K.S.A. 44-551.

<sup>3</sup> K.S.A. 44-552.

<sup>4</sup> See K.S.A. 44-534a.

<sup>5</sup> See K.S.A. 44-552.

respondent's counsel wasn't going to appear, common courtesy if not professional responsibility, dictate that a phone call should have been placed to inquire why no one appeared. That minimal effort would have avoided this entire appeal.

Workers compensation proceedings have been and remain adversarial proceedings.<sup>6</sup> Although not bound by the technical rules of procedure, the Administrative Law Judge is required to give the parties a reasonable opportunity to be heard and to present evidence, to ensure the employee an expeditious hearing and to act reasonably without partiality.<sup>7</sup>

After considering the contents of the Preliminary Hearing Order, the lack of any indication of what transpired by virtue of a transcript, and the confusion that has resulted, this Board Member has no difficulty finding that fundamental due process fairness compels this Board Member to right the course. The ALJ's Order is hereby reversed and this matter is remanded for further proceedings consistent with the Act.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>8</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated June 29, 2007, is reversed and this matter is remanded for further proceedings consistent with the Act.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2007.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>6</sup> *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 281, 949 P.2d 613 (1997).

<sup>7</sup> K.S.A. 44-523(a).

<sup>8</sup> K.S.A. 44-534a.